No. 97-1192

In The

Supreme Court of the United States

October Term, 1997

SWIDLER & BERLIN AND
JAMES HAMILTON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The American College of Trial Lawyers files this brief as *amicus curiae* pursuant to the written consent of the parties.[1]

INTEREST OF AMICUS CURIAE

The American College of Trial Lawyers (the "College"), an organization of lawyers in this country and Canada that are skilled and experienced in the trial of cases, seeks to improve and enhance the standards of trial practice, the administration of justice and the ethics of the profession. Membership in the College is by invitation. The College strives to induct as Fellow lawyers from the top rank of the trial bar of each jurisdiction. The College limits membership to one percent of the number of persons admitted to practice in any particular state. To qualify as a Fellow, a lawyer must have at least fifteen years of trial experience.

Concern for the preservation of the attorney-client privilege motivates the College to submit this brief. The College considers the privilege a critical feature of our adversary system of justice. The College's Board of

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than *amicus curiae* or its counsel.

Regents has authorized the College to seek *amicus curiae* participation in support of the petition for certiorari because the issues presented fundamentally affect the relationship between lawyer and client, the administration of justice and the conduct of the legal profession.

The petition and opposition filed by the parties set forth the particular facts of this case and their respective interests in the litigation. The impact of the decision below, however, extends far beyond the parties to this litigation. It will create a substantial gap in the attorney-client privilege by providing that, in certain criminal cases, the privilege does not survive the death of the client. This decision, which runs counter to more than a century of precedent, will have drastic and unfortunate implications for the legal profession and the administration of justice. Accordingly, the College files this brief *amicus curiae* to present the considerations of broader policy with which it is particularly concerned, as well as its view regarding the sweeping, negative impact that is likely to result from the Court of Appeals decision.

REASONS FOR GRANTING THE PETITION

The College urges the Court to grant a writ of certiorari because the decision of the District of Columbia Circuit raises issues of fundamental importance concerning the scope of the attorney-client privilege and has implications for attorney-client relations far beyond its narrow factual context. A brief description of these implications follows.

a. The Court of Appeals decision is sweeping in its geographic scope. Although the decision only provides for disclosure of attorney-client communications in federal criminal proceedings pending in the District of Columbia, there is no limitation on the locus of these communications. Thus, the decision will inhibit client communications across the nation.

Indeed, since federal criminal proceedings in the District of Columbia often concern (i) acts of elected or appointed officials who are in the District only temporarily to serve in federal government positions, or (ii) private individuals from outside the District based upon their dealings with federal government officials in the District, it is likely that many of the privileged communications that will be disclosed as a result of the Court of Appeals opinion will have occurred outside of the District. Application of the Court of Appeals opinion to require disclosure of such client communications will preclude the clients from relying upon the laws of their home states, which are almost certain to provide that the privilege survives the death of the client. *See* Pet. at 13 n.13 (citing state statutes); Pet. App. 17a (Court of Appeals dissenting opinion).

The evisceration of state privilege laws that will result from the Court of Appeals opinion is of great concern because, as this Court has previously reasoned, "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1930 (1996). Additionally, "any State's promise of confidentiality would have little value if the [client] were aware that the privilege would not be honored in a federal court. Denial

of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Id.*

b. The Court of Appeals establishes an exception to the long-standing common law rule without any factual or legal support. In announcing a standard far easier to state than to apply, the court declares that its "object . . . is to maximize the sum of the benefits of confidential communications with attorneys and those of finding the truth through our judicial processes." Pet. App. 6a. As a threshold matter, the notion that any effort to create an exception to the privilege warrants a fresh policy assessment of the pros and cons of disclosure stands in stark contrast to hundreds of years of authority according absolute protection for attorney-client communications apart from a few, well-defined exceptions such as the crime-fraud and testamentary exceptions. But even assuming that "maximizing the sum of the benefits of confidential communications and those of finding the truth" represents the proper approach, the court's application of that standard leaves much to be desired. Far from undertaking this inquiry with the precision suggested by the court's formulation, the court proceeds without any empirical evidence to support its central conclusion that clients are unlikely to be inhibited by posthumous disclosure of their communications to attorneys in subsequent criminal proceedings.

Nor does the court identify any cases or statutes supporting its interpretation of the privilege, stressing instead the purported absence of an articulated rationale in the long line of authority supporting survival of the privilege after death as a basis for ignoring this body of

precedent. Essentially, the Court of Appeals creates a presumption against the privilege, burdening its proponents with the task of demonstrating its validity. This approach might be warranted if a new privilege was being created, but given the long and virtually unbroken history of precedent supporting survival of the attorney-client privilege after death, the onus should be on those proposing a departure from the long-standing common law rule to justify the change.

c. The court's central assumption – that clients will be indifferent to posthumous disclosure of their communications in criminal proceedings because such disclosure cannot affect them directly – is troubling in several respects. First, it is counterintuitive. Experience teaches that clients care deeply about many posthumous subjects that do not affect them tangibly, such as their reputations after death and legal consequences that might befall friends and family. Clients speak often to lawyers about these subjects, and value highly the confidential nature of these conversations. The Court of Appeals acknowledges this concern in suggesting that posthumous disclosure of client communications in civil proceedings may not be appropriate because clients have a "motive to preserve their estates" and thus would be troubled by disclosure of privileged communications that might affect their estates. Pet. App. 6a.

The Court of Appeals' reasoning applies with at least equal force in the criminal context. A client troubled about the effect of posthumous disclosure on the size of a bequest for a relative will be equally if not more troubled about the possibility that such disclosure could land the

relative in prison. Yet under the Court of Appeals decision, a client fearing criminal liability for a child, for example, will be unable to confide in a lawyer about that risk.

d. The logic of the Court of Appeals' assumption that clients are indifferent to posthumous disclosure could support a wide variety of additional exceptions to the privilege. As noted, this assumption rests on the faulty premise that clients only care about events that affect them personally. There is no logical basis to limit this premise to criminal liability. It is just as natural to suppose that clients will have no concern about the fate of their businesses or the size of their estates after death because at that point they will be no more personally affected by developments in these areas than in a subsequent criminal proceeding. Thus, the Court of Appeals' rationale would logically support expansion of its exception to posthumous disclosure in all civil proceedings.

There are also practical circumstances in which the Court of Appeals' distinction between civil and criminal cases will prove unworkable. For example, a criminal proceeding against a client's child may result in a civil forfeiture action against the client's property. *See, e.g., United States v. One Parcel of Property at 31-33 York Street*, 930 F.2d 139 (2d Cir. 1991) (affirming forfeiture of house belonging to mother following arrest of her sons for drug sales allegedly conducted from the house). In such a case, introduction of a communication as evidence in a criminal proceeding may unavoidably affect a civil proceeding as well, thereby preventing the client from claiming the benefit of the privilege in that proceeding.

The court's alternative rationale for its exception – that posthumous disclosure is needed to obtain truthful testimony because the client is unavailable to testify – has equal potential to lead to further erosion of the privilege. As pointed out in Judge Tatel's dissent, death is not the only circumstance in which a witness is unavailable. "Witnesses unable to remember facts, incompetent to testify, or beyond the court's process likewise deny relevant information to the factfinder." Pet. App. 25a. Moreover, "[t]he unavailability of a witness likewise does no greater harm to the factfinding process than an available witness who testifies inaccurately." *Id.* Accordingly, the rationale that truthful evidence must be adduced contains significant potential for expansion of the Court of Appeals' exception.

e. The significance of the Court of Appeals opinion is unlikely to be reduced by the court's creation of a balancing test to determine whether posthumous disclosure is justified in the particular case. The inherently unpredictable and post-hoc nature of the Court of Appeals' balancing test will create ambiguity concerning the scope of the privilege. Accordingly, no lawyer will be able to offer any assurance to a client that a future court will apply the test to deny disclosure of that client's communications. On the contrary, a lawyer will be bound to warn the client of the prospect of posthumous disclosure along the lines set forth in Judge Tatel's dissent. Pet. App. 20a (lawyer must warn client that "when you die, I could be forced to testify – against your interests – in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution"). The Court of Appeals' amorphous balancing test thus creates the very problem

that led this Court to reject the "control group" test for the attorney-client privilege in the corporate context – that "[a]n uncertain privilege . . . is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

The Court of Appeals' efforts to create a narrow exception will have an additional negative consequence. For every time a prosecutor is able to convince a trial judge that the privileged information sought is "substantially important" to a pending criminal proceeding, there will be hundreds if not thousands of instances in which clients will have been deterred from confiding in their lawyers for fear of posthumous disclosure. Thus, though the Court of Appeals seeks to craft a narrow exception, the aggregate costs of inhibiting full and frank client communications will far exceed any benefits to the truth-seeking process.

CONCLUSION

For the reasons stated in the petition for certiorari and in this amicus curiae brief in support of that petition, the College urges that the petition be granted.

Respectfully submitted,

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